No. 87-416

In The

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE AND
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE

The National Abortion Rights Action League, The American Association of University Women, Americans for Religious Liberty, The Center for Constitutional Rights, The Center for Law and Social Policy, The Northwest Women's Law Center, The United Church of Christ, Office for Church in Society, The United States Student Association, The Women's Equity Action League, and The Women's Law Project

IN SUPPORT OF RESPONDENTS.

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INTERESTS OF AMICI CURIAE

The National Abortion Rights Action League ("NARAL") is a national organization with more than 100,000 members, in both 34 state affiliates and the national organization, which engages in community organizing, leadership development, and lobbying of state and federal legislatures on abortion rights and issues of reproductive self-determination. NARAL is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code[1]; it is not eligible to receive tax deductible contributions.

Because corporations may not contribute to federal election campaigns,[2] NARAL has established a "separate segregated fund,"[3] called NARAL-PAC, which engages in partisan political activity and raises funds from NARAL members to contribute to the campaigns of pro-

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[1] 26 U.S.C. § 501(c)(4) (1982).

[2] 2 U.S.C. § 441b (1982).

[3] 2 U.S.C. § 441b(b)(2)(C) and 11 C.F.R. § 114.5.

choice political candidates.

In addition, in order to raise tax-deductible charitable contributions, NARAL has established the NARAL Foundation, a non-profit organization which engages in public education on reproductive health policy, and specifically on the importance to women of safe, legal, and accessible abortion services. The Foundation is exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code.[4]

This tripartite structure is prompted by the federal tax laws governing non-profit public education and advocacy organizations,[5] as well as federal election laws.[6] Read together, these laws do not permit NARAL to undertake such a wide range of advocacy and electoral activities within the framework of a single § 501(c)(3) or § 501(c)(4) organiza-

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[4] 26 U.S.C. § 501(c)(3)(1982).

[5] Id.

[6] 2 U.S.C § 431-434 (1982).

tion.[7]

Many of NARAL's members are registered voters who actively participate in the political and electoral process. Many of these individuals support pro-choice candidates for elective office by making financial contributions to NARAL-PAC.

Nonetheless, NARAL's pool of donors is generally more likely to contribute to NARAL Foundation than to NARAL-PAC, for several reasons. First, because NARAL Foundation is exempt under § 501(c)(3), contributions to the Foundation to carry out its educational programs may be deducted from federal income taxes.[8] Contributions to NARAL-PAC, by

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[7] Section 501(c)(3) organizations must, as a condition of their preferred tax status (i.e., eligibility to receive tax deductible contributions), refrain from any participation or intervention in political campaigns on behalf of or in opposition to candidates for elective office. This prohibition extends to the publication and distribution of "voters guides" to candidates for elective office where the guides evidence a bias on certain issues. See Rev. Rul. 78-248, 1978-1 C.B. 154.

[8] 26 U.S.C. § 170 (1983).

contrast, are not entitled to such deductions. Second, because a woman's right to abortion is a controversial issue, many donors prefer that their gifts to NARAL not be publicly known. As a general matter, anonymity is not possible for donors to NARAL-PAC, since the names of substantial contributors must be disclosed to the Federal Election Commission.[9]

NARAL's particular interest in the issues before this Court arise from the first-hand experience of its members and supporters as pro-choice electoral activists, and the injuries they have sustained as a result of the seemingly unchecked ability of anti-abortion organizations, including the petitioners in this case, to finance their anti-abortion electoral activities with tax deductible dollars. These violations have injured NARAL in a manner similar to that described in respondents' Amended Complaint, by diminishing NARAL's relative ability to

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[9] 2 U.S.C. § 434 (1982).

influence the electoral process.

The following organizations, some of which are tax-exempt under § 501(c)(3) and under § 501(c)(4), share the concern that respondents and other individual pro-choice activists have standing to redress injuries to them caused by IRS failure to enforce provisions of the Internal Revenue Code against petitioners.

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW and the AAUW Education Foundation and Legal Advocacy Fund support basic constitutional rights for all persons, including First Amendment rights, separation of church and state, the right to privacy, and equal protection under the law. The individual's right to make her own reproductive choices continues to be a priority public policy issue for AAUW.

AMERICANS FOR RELIGIOUS LIBERTY is a non-profit, national educational organization dedicated to defending religious freedom, freedom of conscience, and the constitutional principle of separation of church and state.

The CENTER FOR CONSTITUTIONAL RIGHTS is a non-profit legal and educational corporation founded in 1966. It is dedicated to advancing and protecting the rights and liberties protected by the Bill of Rights. CCR was one of the first legal organizations to become involved in the issue of defending reproductive rights for women.

The CENTER FOR LAW AND SOCIAL POLICY is a public interest law firm which provides representation to women, minorities, the disabled and the poor on issues of family law and policy. To preserve equal access to justice, it is essential to protect the right of private citizens to challenge illegal

government activity, whether such activity occurs through government action or failure to act.

The NORTHWEST WOMEN'S LAW CENTER is a private non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court.

The UNITED CHURCH OF CHRIST, OFFICE FOR CHURCH IN SOCIETY, believes that the Catholic Church has not respected the non-electioneering restrictions governing § 501(c)(3) charities, that the Internal Revenue Service has consistently failed to enforce those restrictions fairly, and that such unfair enforcement policies injure churches and other tax-exempt

advocacy groups like the UCC which do abide by the non-electioneering conditions of their tax-exempt status.

The UNITED STATES STUDENT ASSOCIATION is a national membership organization representing college and university students from around the nation. USSA advocates at the federal level for student concerns on campuses. As a small budget, § 501(c)(4) organization, USSA is concerned that large, wealthy but non-profit organizations continue to receive tax benefits from the federal government at the same time that they participate in politics and the political process. It is for this reason that USSA supports petitioners in this case.

The WOMEN'S EQUITY ACTION LEAGUE is a national non-profit membership organization specializing in economic issues affecting women and sponsoring research, education projects, litigation and legislative advocacy. As a §

501(c)(3) organization, WEAL is concerned that selective enforcement of this provision allows certain donors to obtain a discount on participation in democracy. Selective enforcement disadvantages both other non-profit organizations as well as their donors.

The WOMEN'S LAW PROJECT is a non-profit feminist law firm dedicated to advancing the status and opportunities of women through public education, litigation, advocacy and research. The WLP has played a leading role in defending reproductive rights in the courts, including representing plaintiff women and medical providers in Thornburgh v. ACOG, 476 U.S. 747 (1986).

The WOMEN'S LEGAL DEFENSE FUND is a § 501(c)(3) tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

STATEMENT OF THE CASE

Respondents, plaintiffs below, are Abortion Rights Mobilization, Inc. ("ARM") and other groups and individuals who advocate the belief that abortion of a pregnancy should be a safe and legal option for women. J.A. 6-9. The underlying action was brought by respondents against the Internal Revenue Service (IRS), to challenge IRS' failure to enforce § 501(c)(3)'s prohibition against partisan political activity, which has injured respondents' constitutional rights. J.A. 17-8.

The petitioners herein are not now parties to the underlying action. They are the two principal national organizations of the Catholic Church in the United States, the United States Catholic Conference and the National Conference of Catholic Bishops. J.A. 9. Petitioners are exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code. J.A. 9. Although the petitioners have been dismissed as parties to the underlying action, they remain involved in this lawsuit

due to discovery orders and contempt orders issued against them by the District Court. J.A. 4.

In their Amended Complaint, respondents claimed that certain organs of the Catholic Church have flagrantly engaged in partisan political campaign activities in violation of their § 501(c)(3) status, and that the IRS has failed to enforce against petitioners the laws prohibiting such activity. J.A. 9-14.[10]

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[10] For example, in 1975, petitioners adopted a "Pastoral Plan for Pro-life Activities," which was, in effect, a blue-print for a national anti-abortion campaign. One of the methods described in this Plan to achieve this goal was the creation of "congressional district pro-life action group[s]" whose objectives, inter alia, were:

"(8) To elect members of their own group of active sympathizers to specific posts in all local party organizations.

* * *

(10) To maintain an informational file on the pro-life position of every elected official and potential candidate.

(11) To work for qualified candidates who will vote for a constitutional amendment and other pro-life issues. . . ."

J.A. 12. Since petitioners have moved to dismiss respondents' Amended Complaint, this

Respondents' Amended Complaint also set forth the particularized nature of the injuries suffered by the various classes of respondents as a result of IRS' inaction. Respondents sought an order from the district court requiring the IRS to determine whether petitioners had violated § 501(c)(3) and, if so, to take such action as is required by the statute -- namely, revocation of petitioners' § 501(c)(3) status.

There are two issues now before this Court. First, whether petitioners, as non-party witnesses to a civil suit, have standing to challenge the district court's discovery order by challenging the court's jurisdiction over the underlying case, and second, whether the district court and the U.S. Court of Appeals for the Second Circuit correctly found that respondents had standing to bring this

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Court must accept as true, and to construe most favorably to the respondents, those factual allegations contained in the Amended Complaint. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 n.22, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

action.

Amici curiae fully support respondents' arguments that there is no legal basis for the nonparty petitioners to challenge the district court's jurisdiction over this case, and that ARM and respondent clergy have standing to bring the underlying lawsuit. In this brief, however, amici curiae focus solely on the issue whether electoral activists or members of ARM and the other respondent organizations also have standing to bring this action.

SUMMARY OF ARGUMENT

Respondents in this case are able to satisfy each of the elements of the case and controversy requirements of Article III of the U.S. Constitution. Respondents are 'pro-choice electoral activists' who have suffered particularized injuries to their interests as voters, campaign workers, contributors and candidates, as a result of the unfair advantage obtained by petitioners' use of tax-deductible dollars to finance their anti-abortion electioneering activities.

Respondents' First Amendment rights to a fair electoral process are directly harmed by the IRS' toleration of the de facto subsidization of the anti-abortion electioneering of petitioners. This can be redressed by a district court order directing the IRS to utilize its existing authority to determine whether petitioners have violated § 501(c)-(3)'s prohibition against partisan political activity and, if so, to strip them of their § 501(c)(3) status. Accordingly, respondents

satisfy the Article III requirements of causation and redressability.

This Court has noted the importance of certain 'prudential' concerns to determinations of standing. In the present case, these concerns weigh in favor of respondents' standing. Congress has spoken in favor of vigorous enforcement of § 501(c)(3), and has provided the IRS with new authority to halt abusive political activity by tax exempt organizations -- precisely the relief sought by respondents herein.

Moreover, this Court's sensitivity to separation of powers concerns should counsel in favor of standing in this case. Respondents do not seek any extraordinary equitable relief which would entangle the courts in ongoing monitoring of the IRS. Rather, respondents seek only to have the court direct the IRS to do what is already required by the Internal Revenue Code, namely, to enforce fairly § 501(c)(3)'s prohibition against partisan political activity.

Recognizing respondents' standing will not, of itself, harm petitioners' interests in religious freedom. To the extent that these important First Amendment concerns will need to be addressed on the merits, this is precisely the delicate balancing most appropriate for the courts. The IRS is well-equipped to perform the delicate task of investigating petitioners' alleged tax status violations with due concern for church-state issues, and has been provided statutory tools expressly designed for such sensitive inquiries.

ARGUMENT

I. THROUGH ITS ADMINISTRATION OF THE TAX LAWS GOVERNING CHARITABLE ORGANIZATIONS AND CHARITABLE DEDUCTIONS, IRS ACTIONS IMPLICATE CRITICALLY IMPORTANT CONSTITUTIONALLY PROTECTED RIGHTS, AND THOSE WHOSE CONSTITUTIONAL RIGHTS ARE INJURED BY ITS ACTIONS MUST HAVE STANDING TO SUE.

Respondents have standing to challenge IRS's treatment of petitioners under the tests set forth by this Court in Allen v. Wright, 468 U.S. 737 (1984). Under Allen, a plaintiff must have personally suffered a concrete, particularized injury that is fairly traceable to the challenged conduct and that is redressable by the requested relief. Id. at 751. Respondents' injury to their First Amendment rights as "electoral activists" clearly satisfies this case and controversy requirement of Article III.

A. Respondents Who Are Pro-Choice Electoral Activists Have Suffered Injury-in-Fact to Their First Amendment Rights.

Pro-choice respondents who are politically active as candidates, campaign workers

and campaign contributors[11] have suffered an injury-in-fact to their right to participate in a fair electoral process.[12] This injury arises out of the IRS' failure to halt petitioners' use of tax-deductible dollars to engage in anti-abortion electioneering, in violation of § 501(c)(3) of the Internal Revenue Code. Pro-choice electoral activists are distinctly injured, since they do not use tax-deductible dollars to finance their electoral participation,[13] while their

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[11] These are the respondents who are described in Paragraph 10 of ARM's Amended Complaint. J.A. 9.

[12] This Court has expressly recognized that the first amendment values the process of politics not just its object. See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979). Thus, it is not necessary for respondents to demonstrate that IRS' inaction has affected the outcome of any specific election or campaign, since the injury to pro-choice electoral activists relates to the fairness of the election process, rather than the election result.

[13] Although the effect of deductibility on donations has not been quantified, fundraisers universally recognize its pivotal importance. See, e.g., Taxation with Representation of Washington v. Regan, 676 F.2d 715, 722 (1982), rev'd on other grounds, 461

political opponents do just that. As a result, the IRS has countenanced a tax subsidy for petitioners' anti-abortion electioneering that is not available to respondent pro-choice electoral activists, thereby unfairly affecting the electoral balance and violating respondents' rights under the First Amendment.

It is well established that "granting financial benefits to some interests may be under some circumstances the same as restricting the First Amendment rights of others."

U.S. 540 (1983), citing Bob Jones University v. Simon, 416 U.S. 725, 729-30 (1974) ("[A]ppearance on the Cumulative List is a prerequisite to successful fundraising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List.").

Scholars generally agree that tax incentives are certainly a motivating factor underlying the large amounts that are being contributed to charitable organizations: "The sum of these contributions to public charities is impressive, and was estimated almost ten years ago at $26 billion a year. Contributors are moved to such generosity, in part, by the fact that they may deduct their donations from their personal income taxes." Houck, With Charity For All, 93 Yale L.J. 1415, 1428 (1984).

Common Cause v. Bolger, 574 F. Supp. 672, 680 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983) (citations omitted). Both tax exemptions and tax-deductibility are forms of government subsidy administered through the tax system. As this Court recognized in Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983), "[a] tax exemption has much the same effect as a cash grant to the organization . . . ."[14]

The IRS' inaction constitutes de facto government subsidization of the ideological and political viewpoint of anti-abortion activists. As a result, respondents who are pro-choice electoral activists are clearly injured in their abilities to participate in the electoral process. This injury to respondents as electoral activists can be articu-

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[14] This Court implicitly, and the lower court expressly, recognized that non-recipients of a government subsidy had suffered sufficient injury to confer Article III standing. Taxation with Representation of Washington v. Regan, 676 F.2d. at 744.

lated in three ways: the injury to respondents, first, as pro-choice voters and campaign workers; second, as contributors to pro-choice candidates and political committees; and third, as pro-choice candidates.

1. Electoral activists who are pro-choice voters and campaign workers are injured.

The IRS' failure to halt petitioners' use of tax-deductible dollars to finance their anti-abortion electoral activities has placed pro-choice voters and campaign workers at a comparative disadvantage by effectively subsidizing the partisan electoral advocacy of respondents' ideological opponents. As a result, petitioners' anti-abortion electoral message is magnified, and the voices of pro-choice voters and campaign workers are correspondingly muted. This partisan government subsidy of anti-abortion election messages burdens the First Amendment rights of pro-choice voters and campaign workers whose political viewpoints are not similarly subsidized, and fundamentally upsets the electoral

balance by granting an important advantage to only one side of the electoral debate.

It is well recognized that governmental action which interferes with the free exchange of political viewpoints constitutes sufficient injury to confer standing on voters. For example, in Common Cause v. Democratic National Committee, 333 F. Supp. 803 (D.D.C. 1971), the court held that individual activist members of Common Cause had standing based on their allegation that the federal election laws conferred upon some political candidates and parties an unfair advantage in an election by exempting those candidates and parties from the limitations of a campaign contribution statute. The court reasoned:

> If . . . voters . . . comply with Sections 608 and 609 [of the Federal Election Campaign Act] while other candidates and their supporters do not, the votes of the plaintiffs and their efforts to effect the nomination or election of individuals of their choice are likely to be, as a practical matter, diluted or even nullified . . . Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'"

Id. at 808, citing Baker v. Carr, 369 U.S. 186 (1962) (footnote omitted).

In a similar manner, pro-choice voters and campaign workers who, unlike petitioners here, are not tacitly permitted by the IRS to finance their electoral activities with tax deductible dollars are injured by virtue of their inability to raise and spend the funds necessary to counteract the government-subsidized anti-abortion electioneering of petitioners. Indeed, the IRS' failure to stop petitioners from engaging in prohibited electioneering runs contrary to the clear command of Congress that the IRS more vigorously enforce § 501(c)(3)'s prohibition against partisan political activity.[15]

The suggestion made by the IRS in its brief that respondents' injury as voters is analogous to the injury of "any businessman" as a result of "government action that redounded to the financial benefit of his

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[15] See note 18, infra.

competitor," and therefore is not sufficiently "concrete," or particularized (Brief for Federal Respondents in Support of Petitioners, at 11), is disingenuous. Courts have traditionally applied heightened scrutiny where, as is the case here, the competition is in the political process, which is accorded the highest constitutional protection. Interests in such fundamental, constitutional rights are so great that plaintiffs need only show a very minor stake in the outcome. See Baker v. Carr, 369 U.S. 186, 206 (1962). Such interests are clearly distinct from the interests of commercial competitors with respect to governmental regulation.

2. Electoral activists who are contributors to pro-choice candidates and political committees are injured.

Contributors to pro-choice candidates and campaigns are clearly disadvantaged as a result of the IRS' inaction. Pro-choice supporters who wish to contribute to a pro-choice candidate or political campaign receive

no tax deduction for their contribution, while contributors to anti-abortion groups, such as petitioners, do receive a deduction. Anti-abortion groups are thus able to receive that much more money. This inequity diminishes the relative ability of the pro-choice contributor to participate in the political process.

The interests of pro-choice contributors are similar to plaintiff's interest in Tax Analysts and Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974). In Tax Analysts, a nonprofit organization challenged an IRS ruling that campaign committees, rather than the candidate, are the donees of contributions for the purposes of the $3,000 gift tax exclusion. The individual plaintiff sought standing "[a]s a taxpaying citizen, voter, and small contributor to election campaigns," alleging that the government's action "has the effect on him of substantially diminishing his ability to affect the electoral process and to persuade elected officials to adopt policies and programs he favors." Id. at 899. The

court held that:

> Plaintiff Field's alleged diminution of his vote and the dilution of his ability to affect the electoral process are judicially recognized wrongs and thus sufficient allegations of actual injury.

Id. Exactly the same injury here gives respondents standing in this case.

3. Electoral activists who are pro-choice candidates are injured.

There can be no doubt that pro-choice candidates for public office are injured by petitioners' efforts in support of the election of anti-abortion candidates, and in opposition to the election of pro-choice candidates. Pro-choice candidates and political committees cannot offer potential donors any tax incentives, because, as noted above, contributions to political candidates and committees are not deductible.[16] Thus,

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[16] The limited income tax credit contained in 26 U.S.C. § 24 (1984) for political contributions was repealed by § 112 of the 1986 Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2108. Indeed, political organizations are now required to disclose to all potential donors that they are not eligible to receive

pro-choice candidates have fewer campaign resources than their anti-abortion opponents, who benefit from petitioners' partisan political expenditures financed by unlimited deductible contributions. Accordingly, pro-choice candidates are clearly injured if their political and ideological opponents receive tax-deductible dollars to finance their political activities.

This Court's decision in Buckley v. Valeo, 424 U.S. 1, 11-12 (1976), supports standing for respondents who are pro-choice candidates. In Buckley, this Court found that then-Senator Buckley had standing to challenge the constitutionality of the recently-enacted federal campaign expenditure and contribution limits because he was a candidate. The courts have recognized candidate standing to challenge congressional incumbents' use of the frank in election campaigns. See, e.g.,

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deductible charitable contributions. See 26 U.S.C. § 6113, as added by the Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, 101 Stat. ___, (Dec. 22, 1987).

Schiaffo v. Helstoski, 492 F.2d 413 (3d Cir. 1974); Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973).

B. The Injury Sustained By Respondents Who Are Electoral Activists Is A Direct Result of IRS' Inaction and the Relief That Respondents Request Would Redress Their Injury.

In order to satisfy the requirements of Article III, the injury to respondents' First Amendment rights to a fair electoral process must "fairly be traced to the challenged action of the defendant, and not injury that results from independent action of some third party not before the Court." Winpisinger v. Watson, 628 F.2d 133, 137 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980); Warth v. Seldin, 422 U.S. at 511. In addition, respondents must demonstrate that "'there is a substantial probability' that, if the court affords the relief requested, his injury will be removed." Animal Welfare Institute v. Kreps, 561 F.2d 1002, 1009, cert. denied, 434 U.S. 1013 (1977) (footnote and citations omitted). These

requirements are clearly satisfied here.

Respondents' are seeking to protect their First Amendment rights to a fair electoral process, as distinct from any additional interest in achieving a particular electoral outcome.[17] Their interest in a fair process is directly harmed by the IRS' toleration of de facto subsidization of the anti-abortion electioneering of petitioners. The injury can be directly redressed by an order that the IRS utilize its existing authority to enforce § 501(c)(3). Because the injury here alleged to respondents' interests in a fair electoral process is directly caused by IRS' inaction, this case is clearly different from Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-43 (1976), and Allen v. Wright, 468 U.S. 737 (1984), wherein this Court found Article III jurisdiction to be lacking because the connection between agency conduct and plaintiffs' injuries was too

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17 See supra, note 12.

"speculative." Accordingly, respondents here clearly satisfy the Article III redressability requirement.

Similarly, in Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980), aff'd, 461 U.S. 911 (1983), the court held that plaintiff Common Cause's challenge to the Congressional franking statute, brought on behalf of its members who were registered voters, satisfied the Article III's causality and redressability requirements for standing, stating:

> [T]he causation requirements of the Warth and Winpisinger case are not in issue, because the asserted harm is the franking statute and defendants' action thereunder. There is no third party action complicating the issue. Plaintiffs are directly harmed by defendants' actions.

Id. at 28 (emphasis in original).

In a similar manner, the injury to respondents' First Amendment rights is directly a result of IRS' failure to enforce § 501(c)(3)'s prohibition against petitioners and can be remedied by an order that IRS enforce this provision.

C. This Court's Sensitivity to Separation of Powers Concerns And To Religious Freedom Counsel In Favor of Standing In This Case.

There are no "prudential considerations" that should bar standing in this case. Unlike Allen v. Wright, 468 U.S. at 761, in which this Court denied plaintiffs' standing out of concern that the judicial relief requested would constitute an undue intrusion on the IRS' authority, respondents have not requested this Court to impose on the IRS new rules or procedures governing the enforcement of the Internal Revenue Code which would entangle the courts in ongoing monitoring of the IRS. To the contrary, respondents seek only to have the court direct the IRS to do what is already required by the Internal Revenue Code, namely, to enforce fairly § 501(c)(3)'s prohibition against partisan political activity.

The suggestion made by the IRS that recognizing respondents' standing would, in effect, grant private parties a right of

action under § 501(c)(3) and interfere with functions committed by Congress to IRS' discretion (Brief of Federal Respondents in Support of Petitioners, at 44-45), is without merit. First, no private right of action to enforce federal tax laws is being sought by respondents. Rather, respondents' right of action arises directly under the Constitution as a result of the injuries alleged by respondents' to their First Amendment rights. See Bivens v. Six Unknown and Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). See also discussion supra, at 14-15, on the distinction between the constitutional injuries asserted by respondents and the commercial or financial interests of taxpayers.

Second, recognizing respondents' standing would not undermine any Congressional mandate to IRS. To the contrary, recent congressional actions indicate Congress favors more vigorous IRS enforcement of § 501(c)(3)'s prohibition against partisan political activity by tax

exempt organizations. Congress recently enacted new legislation designed to halt abusive political activity by tax exempt organizations. Among these changes are a grant of extraordinary authority to the IRS Commissioner, in cases of flagrant political electioneering, to seek immediate injunctive relief, to assess taxes in addition to termination of § 501(c)(3) status, and take other appropriate action.[18] Given this clear statement of congressional purpose, the Court should not be hesitant to recognize standing in the present case.

Moreover, respondents have not sought any unusual equitable relief. Respondents seek only for the agency to utilize the same procedure that it uses against (1) secular groups that engage in political activity,[19] and (2) religious groups who violate other IRS

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18 Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. §§ 6852, 7409, Pub. L. No. 100-203, 101 Stat. ___ (Dec. 22, 1987).

19 See Rev. Rul. 78-248, 1978-1 C.B. 154.

rules.[20] These actions demonstrate that the IRS is well-equipped to perform the delicate task of investigating petitioners' alleged tax status violations, and has been provided statutory tools expressly designed for such delicate inquiries.[21]

Some amici in support of petitioners imply that standing should be denied to avoid the delicate issues which would be before the Court if the ARM case were being adjudicated on the merits.[22] It would be wholly inappropriate to use a denial of standing as a means of avoiding difficult legal issues; indeed,

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20 See e.g., Staples v. Commissioner, No. 86-376 (8th Cir., July 1, 1987); Universal Life Church v. Commissioner of Internal Revenue, 87-2 U.S.T.C. para. 967 [CCH] (U.S. Claims Court, 1987), in which IRS revocations of the tax exemptions of religious organizations for violating other tax rules were upheld by the courts.

21 Church Audit Procedures Act, appearing at 26 U.S.C. § 7611 (1984). The statutory interests involved are those of the IRS in its mandate to enforce the tax code.

22 See, e.g. Brief Amicus Curiae of the National Council of Churches of Christ, in the U.S.A., et al., at 5 and 15.

amici for petitioners have cited no cases which suggest that the doctrine of standing can be used for that purpose. Should this case proceed on the merits, a court has the tools and ability to adjudicate the sensitive church-state separation issues implicated, and has already shown itself well able to do so.[23]

Accordingly, this Court's attention to "prudential" issues counsels in favor of respondents' standing in this case.

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23 Even before the merits of this case have been reached, the District Court, in constructing discovery orders, has taken considerable pains to minimize the disruptive effect which the orders might have on the Church entities covered, by substantially reducing the scope of the discovery orders.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

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Re: United States Catholic Conference, et al., v.
Abortion Rights Mobilization, Inc., et al.,
No. 87-416

Dear Ms. Stillson:

On behalf of the United States Catholic Conference and the National Conference of Catholic Bishops, I consent to your filing an amicus curiae brief in this case on behalf of the National Abortion Rights Action League and others.

Very truly yours,

Kevin T. Baine

KTB/vlc

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 5, 1988

Marion Stillson, Esq.
National Abortion Rights Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: United States Catholic Conference v. Abortion Rights Mobilization, Inc., et al., No. 87-416

Dear Mr. Stillson:

This is in response to your letter of February 3, 1988.

On behalf of the United States, I hereby consent to the filing of an amicus curiae brief on behalf of the National Abortion Rights Action League and possibly other organizations in the above case.

Sincerely,

Charles Fried
Solicitor General

MARSHALL BEIL
ATTORNEY AT LAW ■ 19 WEST 44 STREET NEW YORK, NEW YORK 10036 TELEPHONE: 212 575-8500

February 9, 1988

Marion Stillson, Esq.
Staff Attorney
National Abortion Rights
Action League
1101 14th Street, N.W. - 5th Floor
Washington, D.C. 20005

USCC v. ARM, No. 87-416

Dear Marion,

In response to your letter of February 3, 1988, respondents Abortion Rights Mobilization, et al., consent to the filing of an amicus curiae brief in this matter by the National Abortion Rights Action League and other organizations.

Sincerely,

Marshall Beil

MB/fc
cc: Lawrence Lader

APPENDIX B

CERTIFICATE OF SERVICE

I hereby certify that I have caused three (3) copies of the foregoing Brief of Amici Curiae National Abortion Rights Action League, et al., to be served by first class mail postage prepaid upon:

Counsel of Record for Petitioners
Kevin T. Bain
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Counsel of Record for
the Federal Respondents
Charles Fried
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Counsel of Record for Respondents
Marshall Beil
19 West 44th Street
New York, New York 10036

on or before March 11, 1988.

Ellyn R. Weiss

ELLYN R. WEISS
Counsel of Record for Amici Curiae
National Abortion Rights
Action League, et al.